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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There are four opinions below. The first is the opinion of the District Court of the United States for the Northern District of Georgia on the decree dismissing the bill of complaint against the former collector, W. E. Page, which is reported in 10 F. Supp. 901; the second, the opinion of the Circuit Court of Appeals for the Fifth Circuit reversing such decree (R. 454–463), which is reported in 81 F. (2d) 577; the third, the opinion of the said District Court on the entry of a final decree on remand in favor of the respondent and against the

said Page, as such collector, which is reported in 18 F. Supp. 62; and the fourth, the opinion of the said Circuit Court of Appeals rendered December 18, 1937, affirming the last mentioned final decree of the said District Court after the substitution of the encumbent collector, Marion H. Allen, in place of the said Page, after his resignation and decease (R. 431–445), reported in 93 F. (2d) 887.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered December 18, 1937 (R. 446). The petition for certiorari was filed March 18, 1938, and was granted April 11, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the respondent may maintain a suit to enjoin a Collector of Internal Revenue from recovering by distraint admissions taxes imposed by Section 500 of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932, and collected under its authority from purchasers of tickets of admission to intercollegiate football games.

2. Whether Section 11 of the Act of February 13, 1925, permits the substitution of the Collector's

successor in office as defendant and the continuance of the suit against him.

3. Whether the respondent, or its agents, were engaged in the performance of an essential governmental function in staging intercollegiate football games, in which teams representing the University of Georgia and the Georgia School of Technology participated.

4. If question 3 is answered in the affirmative, then whether the Federal admissions tax referred to imposes an unconstitutional burden upon the State of Georgia.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra,* pp. 62–77.

STATEMENT

No returns were filed in respect of the tax imposed by Section 500 (a) (1) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932 (Appendix, *infra,* p. 65), on admissions to athletic events held at the University of Georgia and at the Georgia School of Technology during September and October 1934, the period here in question. Accordingly the then Collector of Internal Revenue for the District of Georgia, W. E. Page, prepared such returns in the amount of $895.37 for admissions tax collected by the University of Georgia Athletic Association on admis-

sions to such events held during that period at the University of Georgia and in the amount of $3,914.63 for admissions tax collected by the Georgia Tech Athletic Association on admissions to such events held at the Georgia School of Technology during that time. Neither sum was paid (R. 329). The Commissioner of Internal Revenue made assessments against each association in the amount thus returned for it and certified the assessments to the said collector (R. 349–350), who forthwith made demand upon each association for the payment of the amount returned for it, and upon its failure to pay filed a lien, issued a warrant, and caused levy thereof to be made upon the bank account in which the association had deposited and was holding the amount of the tax, so collected and withheld by it, as a special trust for the United States, as required by Section 607 of the Revenue Act of 1934 (Appendix, *infra,* p. 66); and, in addition, the said collector served notice of levy and demand for payment upon each of the banks in which these amounts had thus been deposited (R. 356–358).

Thereupon, the respondent, the Regents of the University System of Georgia (a public corporation entrusted by law with the control and management of these schools), filed its bill of complaint, with a later amendment thereto, against the said Page as such collector, in the District Court of the United States for the Northern District of Geor-

gia, praying for a judgment declaring that it was immune from the Federal admissions tax because it was an agency of the State and was performing an essential governmental function in staging the athletic events in question. It further sought an injunction *pendente lite* against said Page as such collector, and against his agents, etc., from proceeding with said collection, and a permanent injunction upon the declaration requested (R. 1–14, 18–24). The complaint was, on motion of Page, dismissed for want of equity. (See *Regents of the University System of Georgia* v. *Page,* 10 F. Supp. 901.)

On the Regents' appeal, the decree of dismissal was reversed by the Circuit Court of Appeals for the Fifth Circuit, Judge Hutcheson dissenting (R. 431–445; 81 F. (2d) 577). The decision proceeded upon the premise that the respondent, or its agents, did not voluntarily act as agents for the Federal Government in the collection of the tax; that it was therefore not estopped to assert that the exaction was an infringement of its constitutional exemption from the tax, and that, since it could not maintain an action to recover the tax if paid, because it was not the taxpayer but only the agent of the Government in collection, it was entitled to maintain the bill to restrain collection.

Upon the ensuing trial, the District Court found the facts to be in substance as follows (R. 153–154): The respondent is a public corporation and instru-

mentality of the State of Georgia, under whose supervision are its two branches, the University of Georgia and the Georgia School of Technology. At all the times here involved, and prior thereto, there was maintained at each of these schools an athletic association, incorporated under the laws of Georgia, known as the University of Georgia Athletic Association and the Georgia Tech Athletic Association, respectively, which had control, among other things, of intercollegiate contests in football, to which the public was admitted upon the payment of admission charges of varying amounts (R. 150–151). The expenses of physical education and athletic programs at each school were supported in large measure from admission charges to athletic contests; in addition, a small student's fee was collected from each student, which was also used for such purpose, the entire expenses of physical education and athletic programs in each school being met by such admission charges and student fees. During and since the year 1934, each ticket of admission to such athletic events at the University of Georgia contained the following notice (R. 152):

> The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its

> liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

The same appeared on all tickets of admission to athletic contests at the Georgia School of Technology, except that the name "School of Technology" was inserted in lieu of the name "University of Georgia"[1] (R. 152). Neither the Regents nor the athletic associations, nor any other branch or instrumentality of the respondent, had made any returns to the petitioner for the period in question of the amount stated on the admission tickets as a tax. Each association kept all amounts so collected separate and apart from all other funds and deposited them in a separate bank account, the amount so collected by the University of Georgia Athletic Association ($895.37) being deposited in the Citizens and Southern National Bank in Athens, Georgia, and that collected by the Georgia Tech Athletic Association ($3,914.63) being deposited in the First National Bank in Atlanta, Georgia. No part of these sums has ever

[1] This was printed on the back of each ticket (R. 152). On the face of each there was printed, in accordance with the requirements of Section 500 of the Revenue Act of 1926, as amended (see Appendix, *infra*, p. 62), the admission price, the amount of the Federal tax, and the total amount of the admission price and tax (R. 193–194); see also Plaintiff's Exhibit 4 (R. 289), and Defendant's Exhibits 6–A and 6–B (R. 344, 345).

been paid to the said Page as such collector or to the United States (R. 150–151); and, upon such failure to make the returns and pay the taxes on said admissions, the said Collector made such returns and assessments in said amounts against the said associations and proceeded to their collection by distraint (R. 153–154).

The District Court construed the decision of the Circuit Court of Appeals to hold that the bill of complaint stated a cause of action and that a decree should go for the respondent if the allegations of the bill were established, as he found them to be (R. 155–156). The court accordingly entered a final decree restraining Page, his agents, etc., from further proceeding under the levies and warrants aforesaid and cancelling them and the liens thereby created (R. 157–158).

The Collector appealed from this decree. During the pendency of the appeal, the defendant Page resigned and, before the argument, died. Over his objection (R. 449–451), the court ordered Marion H. Allen, the successor of the said Page, to be substituted as the appellant in the action (R. 448). The court then affirmed the decree, Judge Hutcheson dissenting (R. 446). The court reached the same conclusion on equity jurisdiction on the second appeal, but upon a different ground, namely, that the respondent had not collected the tax. Its decision on tax immunity is predicated (1) upon the view that the tax affects the State directly and hence casts a burden upon a State

nction, and (2) that the staging of intercollegiate otball games is an essential governmental func-on (R. 433). Judge Hutcheson dissented upon th propositions (R. 440).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that, despite Section 3224 of the evised Statutes, the respondent could maintain suit to enjoin a Collector of Internal Revenue om recovering by distraint admissions taxes im-sed by Section 500 of the Revenue Act of 1926, amended by Section 711 of the Revenue Act of 32, and collected by it or its agents or instru-entalities from purchasers of tickets of admission intercollegiate football games.

2. In holding that respondent had standing to ntest the validity of the tax.

3. In holding that Section 11 of the Act of Feb-ary 13, 1925 (U. S. C., Title 28, Sec. 780), au-orizes the substitution of the Collector's suc-ssor in office and the continuance of the suit ainst him.

4. In holding that the respondent or its agents instrumentalities were engaged in the perform-nce of an essential governmental function in stag-g intercollegiate football games in which teams presenting the University of Georgia and the eorgia School of Technology participated, and at hence that the purchasers of admission tickets ere immune from the tax and it and its agents and

instrumentalities not required to pay over to the Government the amounts it or they had collected from such purchasers as tax.

5. In holding that such tax imposed a direct burden upon the State of Georgia.

6. In reversing the original decree in the District Court of the United States for the Northern District of Georgia dismissing the respondent's bill of complaint for want of equity.

7. In entering its order substituting Marion H. Allen, the incumbent collector, in the place of W. E. Page, the former collector, against whom the suit was instituted, upon his resignation and death during the pendency of the action in the court below on the second appeal.

8. In affirming the decree of the District Court, entered on remand, enjoining the collection of the tax and cancelling the levies, warrants of distraint, and the liens thereby created.

9. In holding that the findings support the decree of the District Court, and that there is evidence to sustain it.

SUMMARY OF ARGUMENT

I

The respondent may not maintain a suit to enjoin a Collector from recovering by distraint admissions taxes collected by it.

(a) The Circuit Court of Appeals held that the taxes had not been collected, or so it now interprets

its earlier decision. Such conclusion, however, does not justify the decision, because neither the District Court nor the court below had jurisdiction to determine that question in an injunction suit. Here it is shown that the Commissioner determined that the tax had been collected. Such determination was not arbitrary but found substantial basis in the acts of the respondent pleaded in the bill. The Government is entitled to require the payment of the taxes as a condition precedent to a resort to the courts by the party against whom the tax is assessed. Congress has specifically withdrawn jurisdiction over any suit having for its purpose the restraint of collection. Section 3224 of the Revised Statutes has been construed to apply to any suit which interferes with or impedes the assessment or collection of the tax. If there is a statute imposing the asserted tax and a proper basis for the Commissioner's determination that the person assessed is liable, the courts have no authority to prevent collection. The bill must stand or fall upon the sufficiency of its averments of such exceptional and extraordinary circumstances as will demonstrate that the proposed action of the administrative officers has no proper basis and is arbitrary. None such is alleged.

(b) One who collects a tax as an agent of the Government may not enjoin the Collector from reducing the amount so collected to his possession. The tax is imposed upon the purchasers of tickets.

Furthermore, the amount collected is by the statute required to be held as "a special fund in trust for the United States." Hence, the lower court erred in holding that the respondent was, at best, merely a debtor of the United States. It is of no moment that the respondent is not in position to assert that the tax casts an unconstitutional burden upon an essential governmental function being performed by it. Respondent has a right to sue for recovery of any money illegally taken from it; but its rights extend no further. It often happens in cases of the imposition of taxes upon its officers or employees, or in respect of its contracts, that neither the United States nor the State is in position to assert any implied constitutional immunity.

(c) Furthermore, the respondent could not maintain the suit upon the basis that it had acquired the rights of the individuals who had paid admissions taxes. The purchasers of tickets were the taxpayers, not the respondent. It is clear that the endorsement on the tickets was designed to put the respondent in position to maintain the suit, and that, but for the agreement evidenced thereby, the court below would have denied it any relief. The purchasers of admissions, and they alone, had claims against the United States for the amount of the tax paid, if it was unlawfully collected; and, only if the endorsement on the tickets operated as an assignment of their claims, have they lost that right by relinquishment thereof to the respondent. If the endorsement was an assignment, it falls within the

purview of Section 3477 of the Revised Statutes which prohibits assignment of claims against the United States. Moreover, the purchasers could not assign rights to an injunction which they did not have. The only right they had was to sue for a refund.

(d) If the respondent, or the athletic associations, did not in fact collect the tax, then they have an adequate remedy at law for the recovery of the amounts assessed against them, in the event they paid the same. Sections 3220, 3226, and 3228 of the Revised Statutes give both an administrative remedy and one at law to any person against whom a tax has been erroneously, or illegally, or improperly assessed, or from whom one has been erroneously, or illegally, or improperly, or in any manner wrongfully collected.

The regulations promulgated under these sections provide with respect to admissions taxes that a claim for refund may be filed by the person or organization against whom the taxes were assessed or by whom they were, in the first instance, erroneously or illegally paid. It is therefore clear that, upon the payment of the amounts involved to the Collector, the respondent would have had the right under the statute and applicable regulation to file a claim for refund and upon its rejection to have instituted an action at law to recover. In such action it could have litigated the question whether it had collected the tax and have recovered its money

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if the question were decided in the negative. On the other hand, if it had collected the tax, its status as a collecting agent—willing or unwilling—would have prevented recovery.

From what has been said it is apparent that the courts below were without jurisdiction to grant injunctive relief.

However, if the Court considers that it has jurisdiction in this suit, to determine whether the amount in question was collected as a tax, then we submit the evidence shows beyond peradventure that it was so collected.

II

Section 11 of the Act of February 13, 1925, does not permit the substitution of the Collector's successor in office as defendant and the continuance of the injunction against him. Generally speaking, the purpose of the statute was to permit revival of an action which had abated as a result of the death of an officer and to inaugurate a policy of permitting the substitution of the office. But nothing in the legislative history of the Act warrants assertion that Congress intended to permit the conversion of a personal action against a Collector into an action to enjoin the office, and hence the sovereign, from the collection of taxes, or to do more than to permit such substitution in cases involving the performance of mere ministerial uties, in which the Government has no direct or

pecuniary interest. In such situations, it was obviously desirable that substitution should be permitted. It has been held that the section does not authorize the substitution of a successor Collector for his predecessor in an action for the refund of taxes; and this even though such actions are in effect suits against the United States. There is much less basis for inferring that the substitution has been authorized and immunity thereby waived in such a suit, particularly since Congress has established through Section 3224 of the Revised Statutes a firm rule against enjoining the assessment or the collection of a tax.

III

The respondent, or its agents, were not engaged in the performance of an essential governmental function in staging intercollegiate football games for profit. We are here dealing with commercialized activities and hence there is no difference in principle between this case and *Ohio* v. *Helvering,* 292 U. S. 360. There the State had entered the market place seeking customers and hence had taken on the character of a trader. Here it entered the market place for the same purpose and took on the character of a purveyor of entertainment. The activity in question is not one of those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

While the Government need not rely upon the fact that the games were not an integral part of the curriculum of either school, it is clear from the evidence that they were not. If the decision in *Ohio* v. *Helvering, supra,* could be avoided by placing college authorities in charge of a project, almost any business could be conducted in the name of education. The educational features can in no event extend further than the student body. Such as were involved are limited to the players and cannot be extended to the general public invited to attend the games upon the payment of admission fees. Accordingly, the public cannot be considered auxiliaries primarily designed and used to aid in the management and operation of a governmental function. It follows that the attendance of the general public does not partake of the nature of such function. The immunity is not established because the State has the power to engage in the business of conducting football games. The whole doctrine of immunity is implied from the need of preserving the separateness and independence of the States; and where the reason for its application does not exist, it will not be applied.

IV

The admissions tax does not impose an unconstitutional burden upon the State, even if the staging of these games is deemed to involve the performance of an essential governmental function. The test is not the nature of the activity, as the

court below concluded. It is most problematical that respondent's receipts from its admissions would be diminished by the imposition of this tax upon its patrons. But even if they were diminished, it is settled that a non-discriminatory tax upon private persons may not be declared invalid for this reason. If respondent should object that it cannot be compelled to collect the Federal tax, the short answer is that this is a contention which can be raised only if a penalty should be asserted for its failure to collect the tax. It would be most inequitable to permit respondent to collect a tax for the Federal Government and then resist its payment on the ground that it could not have been compelled to collect.

ARGUMENT

I

THE RESPONDENT MAY NOT MAINTAIN A SUIT TO ENJOIN A COLLECTOR OF INTERNAL REVENUE FROM RECOVERING BY DISTRAINT ADMISSIONS TAXES, IMPOSED BY SECTION 500 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 711 OF THE REVENUE ACT OF 1932, AND COLLECTED UNDER ITS AUTHORITY FROM PURCHASERS OF TICKETS OF ADMISSION TO INTERCOLLEGIATE FOOTBALL GAMES

The question whether the court below erred in holding that the respondent could maintain a suit to enjoin the collection of admissions tax involves a number of subsidiary questions, namely: (a) whether the bill of complaint states any facts to entitle the respondent to injunctive relief and hence

whether the decree of the District Court granting the motion to dismiss was correct and should not have been reversed; (b) whether one who collects a tax as an agent of the Government may enjoin the Collector of Internal Revenue from proceeding by distraint to reduce the amount so collected to his possession; (c) whether the respondent could maintain the suit upon the basis that it had acquired the rights of the individuals who paid admissions taxes; and (d) whether, if the respondent or the athletic associations did not in fact collect the tax, it or they had an adequate remedy at law for the recovery of the amounts assessed against them in the event that they had paid the same. An answer in the negative to any one of these questions is dispositive of this case. We take them up in the order named.

(a) THE BILL OF COMPLAINT STATES NO FACTS TO ENTITLE THE RESPONDENT TO INJUNCTIVE RELIEF AND HENCE THE DECREE OF THE DISTRICT COURT GRANTING THE MOTION TO DISMISS WAS CORRECT AND SHOULD NOT HAVE BEEN REVERSED

This being a suit in equity to enjoin the collection of taxes, it was rightly dismissed by the District Court (10 F. Supp. 901), and the court below erred in reversing the decree of dismissal. It appears from the bill of complaint that teams representing the University of Georgia and the Georgia School of Technology played football games during the months of September and October, 1934, to which admissions were charged; that each ticket of admission stated a part of the amount collected

as a tax; that 10% of the amount of all admissions so collected was set aside and deposited in separate bank accounts;[2] and that the Collector of Internal Revenue had levied warrants of distraint upon such bank accounts and demanded payment of the money to him in satisfaction of the assessments. It was further shown that each ticket of admission bore the following statement (R. 9):

> The University of Georgia [or School of Technology], being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admissions tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax.

The bill alleged that the applicable Revenue Act imposed the admissions tax upon the individuals who purchased tickets, but that, properly construed, the statute was not applicable to individuals purchasing tickets of admission to the football games played at the University of Georgia and the Georgia School of Technology. It was further alleged that no taxes had been collected from the individuals purchasing tickets for admission to

[2] This was pursuant to Section 607 of the Revenue Act of 1934 (App. *infra*, p. 66).

such games and that the Collector sought to collect from respondent either (a) taxes which the statute, if applicable, had imposed upon the individuals who purchased tickets, or (b) criminal penalties imposed by the statute upon the respondent (R. 22–23).

The respondent was obliged to pay over to the Collector the taxes it had collected. Section 500 (a) of the Revenue Act of 1926, as amended by Section 711 of the Revenue Act of 1932 (App., *infra*, p. 65) imposes "A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission * * *." Section 502 (a) of the Revenue Act of 1926 (App., *infra*, p. 63) imposes the duty of collecting the tax upon the person receiving payment for such admissions. Such person is thereby required to make monthly returns of the tax so collected and to pay it to the Collector. Section 607 of the Revenue Act of 1934 (App., *infra*, p. 66) requires that the amount of tax so collected shall be held in a special fund in trust for the United States, and that the liability imposed by Section 502 (a) upon the vendor of the tickets is to be enforced in the same manner and subject to the same provisions as are applicable with respect to the taxes from which such fund arose. Thus Section 3187 of the Revised Statutes (App.,

infra, p. 67), authorizing distraint, is made applicable.

Notwithstanding the allegation that no taxes had been collected by the respondent, the facts alleged in the bill disclose that whatever taxes were due had, in fact, been collected; that the amounts required by Section 500 (a) and the regulations promulgated thereunder to be stated on the admission tickets as taxes had been so stated (R. 9), and that the respondent, in order to protect itself, had reserved and set aside 10% of what it claims to be the amount so collected (R. 12). It clearly appears from the bill that the respondent took the necessary steps to relieve itself from penalties which the statute imposes for wilful failure to collect admissions taxes, and that such precautions are utterly inconsistent with its contention that the taxes had nevertheless not been collected. Under the circumstances, the allegation that no taxes had been collected is a mere conclusion of law which the District Court was free to and did disregard.

The Circuit Court of Appeals held that the taxes had not been collected—or so it now interprets its earlier decision. However, its conclusion that the tax was not collected, upon which it predicated its reversal of the District Court's dismissal of the bill, does not justify such reversal, because neither the District Court nor the court below had any jurisdiction to determine that question in an in-

junction suit. Here it was shown that a Federal statute imposed a tax upon admissions which the respondent was required to collect; that the Commissioner had determined that the tax had been collected; that such determination was not arbitrary, but found substantial basis in the acts of the respondent with respect thereto pleaded in the bill; that a fund or funds existed consisting of the exact percentage of admissions which the statute required to be collected; that the fund was on deposit to the respondent's credit; and that the Collector sought to reduce that fund to his possession. In such a situation there was no alternative to the granting of the motion to dismiss, and the court below was without power to determine the merits of the controversy as to whether the tax had in fact been collected by the respondent.

The Government is entitled to require the payment of the taxes as a condition precedent to a resort to the courts by the party against whom the tax is assessed (*Cheatham* v. *United States,* 92 U. S. 85, 88–89; *Phillips* v. *Commissioner,* 283 U. S. 589, 595, 597), and Congress has specifically withdrawn jurisdiction over any suit having for its purpose the restraint of collection of any taxes (Section 3224, Revised Statutes, Appendix, *infra,* p. 68). This statute has been construed to apply to any suit which would interfere with or impede the administration of the tax. *Gouge* v. *Hart,* 250 Fed. 802 (W. D. Va.), appeal dismissed, 251 U. S. 542; *Rals-*

ton v. *Heiner,* 24 F. (2d) 416 (C. C. A. 3d), certiorari denied, 277 U. S. 608; *Calkins* v. *Smietanka,* 240 Fed. 138 (N. D. Ill.); *Seaman* v. *Guaranty Trust Co. of New York,* 1 F. (2d) 391 (S. D. N. Y.).

We submit that the cases demonstrate that the administrative officers may not be interfered with when it is shown that they are acting under a statute which is or may be applicable to the persons whom the Commissioner holds to be liable therefor in any capacity. If there is a statute imposing the asserted tax, and if there is a proper basis for the Commissioner's determination that the person assessed is liable, the courts have no authority to prevent the collection. In *Snyder* v. *Marks,* 109 U. S. 189, 192–193, this Court interpreted Section 3224, Revised Statutes, as authorizing the Collector to collect "that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed."

We submit that a proceeding seeking to enjoin the collection of Federal taxes must stand or fall upon the sufficiency of the averments in the bill of complaint of the existence of such exceptional and extraordinary circumstances as will demonstrate that the proposed action of the administrative officers has no proper basis and is arbitrary. In addition it must appear that, without equitable relief, the complainant will suffer great, immediate, and irreparable injury to its property.

The challenged imposition is clearly a tax and those cases involving criminal penalties, such as *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, are without application. Equally inapplicable are stockholders' suits, such as *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, and *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. *Hill* v. *Wallace,* 259 U. S. 44, was a stockholder's suit, and this Court has also classed it with the penalty cases. *Graham* v. *du Pont,* 262 U. S. 234, 235, 237–238. Moreover, the basis for stockholders' suits has now been removed, since it is no longer necessary to protest the payment of tax in order to preserve the right to maintain suit. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373.

Miller v. *Nut Margarine Co.,* 284 U. S. 498, involved a situation where this Court said (p. 510): "A valid oleomargarine tax could by no legal possibility have been assessed against respondent * * *." In that case the plaintiff's product was not taxable under the Oleomargarine Act. This was clear from prior decisions of the administrative officers with respect to the very product involved. It was also clear from the decisions of the courts with respect to like products. It appeared that the Commissioner had changed his ruling and sought to collect taxes for the entire period during which the plaintiff had been in business without asserting similar taxes against competitors. The amount of the tax exceeded the selling price of the product and its collection would have been ruinous.

The Commissioner's determination was based upon regulations which assumed that the taxing statute was intended to be punctuated differently, and this Court held (p. 508) that "the Commissioner's rendition of the governing phrase was without warrant." The case at bar presents no analogy to the situation existing in the *Nut Margarine Co.* case. Here it did not appear upon the face of the bill that the taxes could by no legal possibility have been collected by the respondent. There is no denial that the language of the statute supports the assessments. At most it appeared that there was a controversy with respect to the construction and validity of the statute in its application to respondent. Controversies not essentially different occur frequently, but nothing is better settled than that the initial construction and application of taxing statutes are committed to the administrative officers and that the jurisdiction of the courts to correct any errors is postponed until after the taxes have been collected.

Neither the averment that the tax is unconstitutional (*Bailey* v. *George,* 259 U. S. 16), nor the anticipation of a multiplicity of suits (*Dodge* v. *Osborn,* 240 U. S. 118; *Pacific Whaling Co.* v. *United States,* 187 U. S. 447; *City of Seattle* v. *Poe,* 4 F. (2d) 276 (W. D. Wash.)), nor injustice, hardship, irregularity, or inconvenience (*State Railroad Tax Cases,* 92 U. S. 575; *Reinecke* v. *Peacock,* 3 F. (2d) 583 (C. C. A. 7th), certiorari denied, 268 U. S.

699), nor danger of loss of credit or inability to pay because of lack of funds (*Thornhill Wagon Co.* v. *Noel,* 17 F. (2d) 407 (E. D. Va.)), nor the allegation that the tax is confiscatory, or too high (*Broadway Blending Corporation* v. *Sugden,* 2 Fed. Supp. 837, 839 (W. D. N. Y.); see also *McCray* v. *United States,* 195 U. S. 27), may be made the basis for injunctive relief.

We submit that the bill on its face shows that the Collector's proposed action was not arbitrary, and that it discloses no facts whatever showing that the respondent was threatened with irreparable injury, and none that the case was within some recognized principle of equity jurisprudence. Under these circumstances, the dismissal of the bill should in the first instance have been affirmed.

(B) ONE WHO COLLECTS A TAX AS AN AGENT OF THE GOVERNMENT MAY NOT ENJOIN THE COLLECTOR OF INTERNAL REVENUE FROM PROCEEDING BY DISTRAINT TO REDUCE THE AMOUNT SO COLLECTED TO HIS POSSESSION

In limine, the bill of complaint alleges (R. 10) that a claim for refund was denied after the taxes had been paid for an earlier period, and the lower court refers to that fact in its decision reversing the dismissal of the bill (81 F. (2d), at p. 580).[8]

[8] In an opinion handed down by the court below on April 16, 1938, in the case of *Marion H. Allen, Collector* v. *George L. Shelton,* Judge Holmes, who wrote the opinion of the court on the prior appeal, in distinguishing the case at bar, stated that the special and extraordinary circumstances which in its judgment warranted equitable relief in the

But surely this does not justify the grant of an injunction. The denial of such claim was merely a preliminary step in securing a judicial determination of respondent's rights; its denial does not demonstrate that it has no remedy at law, and it could, therefore, not make its failure to submit the earlier controversy to the courts a justification for enjoining a later collection. However, the purpose of the allegation seems to have been to demonstrate that when it collected the tax, as it concededly did in the prior period, its claim for refund was properly denied, because it had no standing as a collecting agent to challenge the validity of the tax. Indeed, the court below so held (*loc. cit.*, p. 580), and to the authorities there cited should be added *Columbus & Greenv. Ry.* v. *Miller,* 283 U. S. 96, 100; *United States* v. *First Capital Nat. Bank,* 89 F. (2d) 116, 124 (C. C. A. 8th); *United States* v. *American Exchange Irving Trust Co.,* 43 F. (2d) 829 (S. D. N. Y.); also *Miami Valley Fruit Co.* v. *United States,* 45 F. (2d) 303 (C. C. A. 5th), certiorari denied, 283 U. S. 841, and *United States* v. *Erb,* 8 F. Supp. 947 (S. D. N. Y.).

Even taxpayers who have paid over but have not borne the burden of and have "passed on" a tax to others may be denied refunds by statute. *An-*

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case at bar were "demonstrated by the fact that the Regents had actually paid the tax in former years, and filed a claim for refund which was denied on the ground that they had not borne the burden of any part thereof."

niston Mfg. Co. v. *Davis,* 301 U. S. 337, 348; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386. Apart from statute the tax cases have applied the doctrine of unjust enrichment and the view that an action for refund of a tax is an action for money had and received which is governed by the broadest equitable principles and considerations of abstract justice and which denies a refund to one not entitled in "equity and good conscience" to receive it. See *United States ex rel Girard Co.* v. *Helvering,* 301 U. S. 540, 542; *Stone* v. *White,* 301 U. S. 532, 534–536; *Bull* v. *United States,* 295 U. S. 247, 261–262; *Lewis* v. *Reynolds,* 284 U. S. 281, 283. In the absence of statute refund of a tax has been denied on the grounds that the plaintiff who has shifted the burden of the tax does not come into equity with clean hands. *Richardson Lubricating Co.* v. *Kinney,* 337 Ill. 122; *Standard Oil Co.* v. *Bollinger,* 337 Ill. 353.

The tax is not imposed on the respondent as vendor of tickets but on the purchasers. The statute imposes no tax liability on a vendor who fails to collect the tax,[4] although it does subject him to a penalty for willful failure to collect the tax in an amount equal to the tax and to other penalties. Revenue Act of 1926, Sections 500 (d) and 1114

[4] In this respect it differs from collections made at the source by persons paying compensation to non-resident aliens under Section 221 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 35. See *Houston Street Corp.* v. *Commissioner,* 84 F. (2d) 821 (C. C. A. 5th).

(b), (d), (e), and (f). (Appendix, *infra,* pp. 62, 64, 65.)[5]

Furthermore, the amount of the tax collected is by statute constituted and required to be held as "a special fund in trust for the United States." (Section 607 of the Revenue Act of 1934, App., *infra,* p. 66.) It is submitted that the fund was no less the property of the United States than if it had been deposited in its name or in the name of one of its fiscal officers or had been paid directly into the Treasury. Whatever effect the endorsement had was to put the respondent in the position to recoup from the United States the amounts the purchasers would have been entitled to recover had their claims for refund been sustained. It follows that the lower court was in error when in its previous opinion it indicated in reliance upon *United States* v. *Johnston,* 268 U. S. 220, 226, that

[5] If, as respondent asserts, there is no authority to impose this tax or to require the State to collect it, neither would there be any authority to impose a penalty for failure so to collect. Respondent's lack of confidence in its ability to establish its immunity and avoid the penalty is a wholly inadequate basis for the maintenance of this action.

What respondent insists upon is a right to raise a constitutional question whether or not the tax is imposed upon it. But there is no abstract right to raise a constitutional question. This Court has pointed out that constitutions are intended to preserve practical and substantial rights, not to maintain theories. *Davis* v. *Mills,* 194 U. S. 451. Respondent has a right to maintain a suit to recover any money erroneously taken from it and it is entitled to nothing further.

at best the respondent was merely a debtor of the United States. (*Loc. cit.*, p. 581.) In that case it was held that the provisions of the 1918 Revenue Act as to collections of admissions taxes made the vendor of admissions the debtor of the United States and not a bailee. But this Court clearly indicated that the situation was different under other acts, referring to *United States* v. *Thomas*, 15 Wall. 337.

It would therefore seem to be useless to pursue the matter further, if it were not for the circumstance that the assumed lack of a remedy was relied upon by the respondent and considered by the court below as a basis for injunctive relief. (See paragraph 23 of the bill of complaint, R. 10, and the opinion of the court below on the prior appeal.) (*Loc. cit.*, p. 580.) Furthermore, this was undoubtedly the circumstance which induced the lower court to hold that the agreement which the respondent imposed upon the purchasers of admissions was one of which the United States could not complain (*loc. cit.*, p. 580), and as a result of which it held the respondent had obtained title to the money which represented the amount of the tax collected (*loc. cit.*, p. 581).

While *United States* v. *First Capital Nat. Bank, supra,* involved a suit by the United States for the recovery of the tax from the depository of football admission taxes collected by the University of Iowa, the only factual difference between the two

cases lies in the fact that in the former the University did not state on the admission tickets that the amount collected as a tax would be considered a part of the admission charge if the Government's claim thereto were defeated. But, surely, an agent of the Government cannot put himself in position to maintain an injunction suit or otherwise resist the reduction to the Collector's possession of the amount collected by the agent as a tax by forcing a stipulation upon the purchaser that the amount so collected from him shall belong to the agent in the event he succeeds in defeating the Government's claim thereto.

In any event, it is of no moment that the respondent is not in position to assert that the tax casts an unconstitutional burden upon an essential governmental function being performed by it. As a mere agent, respondent has no interest which can be adverse to the United States. It often happens, in cases of the imposition of taxes upon its officers or employees, or in respect of its contracts, that neither the United States nor the State is in position to assert any implied constitutional immunity, although, unlike respondent, it may have a vital interest in the question. Take, for example, the position of the United States in the case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134 and *Alward* v. *Johnson*, 282 U. S. 509, and that of the State in *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, *Liggett & Myers Co.* v. *United States*, 299 U. S.

383, and in the later case of *Helvering* v. *Mountain Producers Corp.*, No. 600, decided March 7, 1938. Indeed, neither the Government nor the State could urge any immunity except through an attorney who by leave of court appeared as its friend. There is no reason why the respondent should be placed in a better position in respect of taxes paid by the general public on admissions charged to exhibitions which it stages.[6]

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[6] We have throughout the argument assumed, although we realize the violence of the assumption, that the separate entities of the respondent and the athletic associations may be disregarded and that the respondent is the real party in interest here. However, as already stated, the athletic associations were separate entities. They, and not the respondent, staged the games, collected the admissions and the tax. The amount of the tax was deposited in the accounts in their names or in the names of their officers. (R. 216–217.) The assessments were made against them and the levies of distraint upon the accounts mentioned. Furthermore, they kept their own books of account and had their own bank accounts from which they paid their own expenses by checks written by their own officers. (R. 191–195, 207; Defendant's Exhibits 25, 26, 27, R. 381–386; Defendant's Exhibits 4, 5–A, 5–B, 5–C, 27, 28, 29, R. 342–343, 384–387.) They hired their own employees, including football coaches, and paid their employees with their own funds. (R. 177, 197, 207.) No educational department of the school was similarly situated. (R. 225–226, 235.) As evidencing the independence of these corporations, see the contract forming the basis of the litigation in *State* v. *Regents of the University System*, 179 Ga. 210, 175 S. E. 567, under which the athletic corporations were to pay rent for the use of the athletic pavilions belonging to the schools. In short, the respondent did not, in its corporate capacity, conduct the athletic activities in question and did not collect

The reasoning of the court below is inconsistent. It concedes that, if respondent collected the tax as agent of the United States, respondent would have no standing to question the validity of the tax. The reason it would have no standing, as stated by the court (*loc. cit.*, p. 580), is that in such a situation respondent would have no interest in the subject matter of the controversy. Nevertheless, a lack of interest in the subject matter which would prevent it from questioning the validity of the statute in a suit at law is regarded by the court as an exceptional and extraordinary circumstance which entitles the respondent to maintain an injunction suit—and this despite an express statutory prohibition. We submit that such reasoning contains its own refutation.

(C) THE RESPONDENT COULD NOT MAINTAIN THE SUIT UPON THE BASIS THAT IT HAD ACQUIRED THE RIGHTS OF THE INDIVIDUALS WHO PAID ADMISSIONS TAXES

There can be no question that the purchasers of the tickets were the taxpayers, not the respondent. Indeed, the court below so considered, for in its opinion on the prior appeal it specifically said (*loc. cit.*, p. 581) that the respondent was not the taxpayer, but, at best, merely an alleged debtor to the

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the tax. Nor were the assessments made against it, but against the associations. (R. 153, 349–350.) The result is that it is obviously not the real party in interest here, and for this additional reason is not in position to maintain this suit.

United States for *moneys had and received*. Furthermore, as has already been pointed out, the decision below proceeded upon the premise (*loc. cit.*, pp. 580–581) that the endorsement on the tickets was an agreement between the purchasers of admissions and the respondent by which title was vested in the respondent to that part of the moneys collected which represented the tax. And, in its opinion on the second appeal, the court thus explained its prior decision (R. 432):

> This court in its former decision held that the money was not collected as a tax, but under a peculiar contract with the ticket buyers whereby the complainants [the respondent] were entitled to assert ownership of it *if they could prove that no tax is collectible.* It was also held that under the peculiar circumstances, *including that just mentioned,* injunction was an available remedy. [Italics supplied.]

It would therefore seem clear that, in the opinion of the court below, the endorsement was made in order to put the respondent in position to maintain the suit, and that, but for the agreement evidenced thereby, the court below would have denied it relief. Compare *United States* v. *First Capital Nat. Bank, supra.* Therefore, the purchasers of the admissions, and they alone, had claims against the United States for the amount of the tax paid, if it was unlawfully collected; and only if the endorsement on the tickets operated as an assign-

ment of their claims have they lost that right by relinquishment thereof to the respondent. See *H. M. O. Lumber Co.* v. *United States* (W. D. Mich.), decided November 12, 1929, not officially reported, but see 1929 C. C. H., Vol. III, paragraph 9438, wherein the decision of this Court in *Spofford* v. *Kirk,* 97 U. S. 484, 490, is relied upon.

If the endorsement on the tickets was an assignment of these claims, we submit that, as such, it falls within the purview of Section 3477 of the Revised Statutes (Appendix, *infra,* p. 67). In speaking of the character of assignments embraced thereby, this Court in the *Spofford* case said (pp. 488–489):

> It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes power of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself.

On the theory of the court below, the claims of the individual taxpayers are here sought to be enforced against the United States by the assignee and for his sole use and benefit. Thus the United States is "in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability," against which the

statute was designed. *Martin* v. *National Surety Co.*, 300 U. S. 588, 594–595, 596–597.

The statute has repeatedly been applied to assignments of claims for refund of taxes. See, e. g., *Dalton Foundries* v. *United States*, 56 F. (2d) 483, 487 (C. Cls.); *H. M. O. Lumber Co.* v. *United States, supra; Choctaw Cotton Oil Co.* v. *United States*, decided October 9, 1931 (E. D. Okla.), not officially reported, but see 1931 C. C. H., Vol. III, paragraph 9631; *Cowpens Manufacturing Co.* v. *United States*, decided May 11, 1932 (W. D. S. C.), not officially reported, but see 1932 C. C. H., Vol. III, paragraph 9406. Compare *Daube* v. *United States*, 59 F. (2d) 842 (C. Cls.); *Fidelity Title & Trust Co.* v. *Heiner*, 34 F. (2d) 350 W. D. Pa.) and *Carleton Dry Goods Co.* v. *United States*, decided March 15, 1928 (E. D. Mo.), not officially reported, but published as Treasury Decision 4209, VII–2 Cumulative Bulletins 172, and in 1928 C. C. H., Vol. III, paragraph 7905.

And finally, in this connection, we submit that it is of no moment that the suit is not specifically brought for the recovery of a sum of money, but one to prevent the proper officer of the United States from reducing the trust fund to his possession. The prohibition of the statute does not concern itself with the manner in which the right under an assigned claim is asserted, but only with its assignment.

In order to create any rights which they could transfer, the individual purchasers of tickets must

ıave paid the tax. Therefore, they could not have ıssigned the right to enjoin collection from them. If the individual purchasers of the tickets paid the ax, they would have a remedy at law to recover it. Hence, if they assigned anything, it must have been a remedy at law. Assuming with the court below hat the assignment was valid, the respondent, in ts turn, acquired a remedy at law; and yet the ourt below based its decision upon the absence of uch a remedy.

D) IF THE RESPONDENT OR THE ATHLETIC ASSOCIATIONS DID NOT IN FACT COLLECT THE TAX, THEN IT OR THEY HAD AN ADEQUATE REMEDY AT LAW FOR THE RECOVERY OF THE AMOUNTS ASSESSED AGAINST THEM IN THE EVENT THEY HAD PAID THE SAME

The bill of complaint alleges that the tax was in fact sought to be collected from the two schools as "branches of the State of Georgia"; that the sums demanded and sought to be distrained represented certain admissions; that the fund levied upon was the exclusive property of the respondent, and that it, and the athletic associations under its instructions, had refused to collect and had not collected any tax on such admissions for the Government. (See paragraphs 13, 14, and 19 of the bill, R. 5, 8.) Thus the theory of the respondent's bill is that under the facts alleged, and particularly because of the reservation in the endorsement, the associations did not collect the tax.

If so, Sections 3220, 3226, and 3228 of the Revised Statutes, as amended (App., *infra*, pp. 67, 68,

69), give both an administrative remedy and one at law to any person against whom a tax has been erroneously, or illegally, or improperly assessed, or from whom one has been erroneously, or illegally, or improperly, or in any manner wrongfully collected.

In so far as the recovery of admissions taxes so assessed or collected under sanction of the statute are concerned, Section 3220 provides that refunds shall be made "subject to regulations prescribed by the Secretary of the Treasury." Pursuant to such authority, the Commissioner, with the approval of the Secretary, on June 14, 1932, promulgated Article 4 of Treasury Regulations 43, already referred to (Appendix, *infra,* p. 67). This Article provides, among other things, that:

> A claim for the abatement or for the refund of any taxes alleged to have been erroneously and illegally assessed or paid * * * must be filed by the person or organization against whom the taxes were assessed, or by whom such taxes were in the first instance erroneously or illegally paid. * * *

Therefore, since the assessments were made by the Commissioner against the athletic associations pursuant to the supposed authority of Section 607 of the Revenue Act of 1934 (App., *infra,* p. 66), and since the question available to respondent in an appropriate proceeding is whether the associations collected the amount representing the tax, as such, or as a part of the admissions fee, and since that question was determined by the Commissioner

gainst the associations, it follows that the right of
ie associations (or the respondent) to refunds
epended on whether the Commissioner was in
rror in his determination that, under the facts
f the case, the associations had in fact collected
ie tax.

Thus it is clear that, upon payment of the
mounts involved to the Collector, the athletic as-
ociations (if not the respondent) would have had
ie right under the statutes and the applicable reg-
lations to file claims for refund, and upon their
ejection to have instituted actions at law to re-
over. And in such actions they could have liti-
ated the question whether, under the facts of the
ase, they had collected the tax or not. In such a
uit a determination that they had not collected
ie tax would result in a judgment in their favor
nless the Court determined a liability under Sec.
114 (d) for a penalty. In that event the oppor-
unity would be afforded to raise the constitu-
onal question. On the other hand, if they had
ollected it, their status as collecting agents—will-
ig or unwilling—would have prevented them from
aising the constitutional question, with the result
iat judgments would have had to be entered
gainst them. It follows that the associations (if
ot the respondent) had an adequate remedy at
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For the reasons set out in the several subdivi-
ons in this point, it is respectfully submitted that

the bill of complaint states no grounds whatsoever for injunctive relief. The court had no jurisdiction to grant any relief and the bill should therefore have been dismissed.

However, if the Court considers that it has jurisdiction in this suit to determine whether the amount in question was collected as a tax, then we submit the evidence shows beyond peradventure that it was so collected. It discloses that the tickets separately stated the amount of the admission price, the amount of the tax, and the total of the two, and that the amount collected as tax was held and deposited in a separate fund or funds. Thus it is clear that the conclusion of the court below "that the money was not collected as a tax" is grounded solely on the agreement evidenced by the endorsement on the tickets, whereby, in its opinion "the complainants [the respondent] were entitled to assert ownership if they could prove that the tax was not collectible" (R. 432). We submit that both the conclusion and the basis upon which it rests are erroneous and that there is no evidence whatsoever to justify injunctive relief.

II

SECTION 11 OF THE ACT OF FEBRUARY 13, 1925, DOES NOT PERMIT THE SUBSTITUTION OF THE COLLECTOR'S SUCCESSOR IN OFFICE AS DEFENDANT AND THE CONTINUANCE OF THE SUIT AGAINST HIM

Whatever authority exists for the substitution of the present Collector in the place of the deceased

Collector as defendant-appellant in this action must be found in Section 11 of the Act of February 13, 1925 (App., *infra,* p. 70), which, in so far as material here, provides that:

> * * * where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, * * *.

The precise question here presented, whether the substitution of the successor Collector may be made in a suit to enjoin his predecessor, since deceased, was reserved by the decision of this Court in *Ex Parte La Prade,* 289 U. S. 444, 459, although it is the Government's position that the rationale of that case is that the action, being purely personal to the deceased Collector, does not survive. The reservation thus made requires an examination of the question.

The Government concedes that, generally speaking, the purpose of the statute is to permit the revival of an action which has abated as a result of the death of an officer, where it appears that the cause of action survives. In such cases, the Con-

gressional purpose was to inaugurate a policy of permitting the substitution of the *office*. See *Fix* v. *Phila. Barge Co.*, 290 U. S. 530, 533, citing *Tyler* v. *Hand*, 7 How. 573; the opinion of Judge Learned Hand in *Bowers* v. *American Surety Co.*, 30 F. (2d) 244 (C. C. A. 2d); the report on the original measure (the Act of February 8, 1899, c. 121, 30 Stat. 822), namely H. Rep. No. 960, 55th Congress, Second Session, and the discussion of the question had on the floor of the Senate, on April 14, 1898, Congressional Record, Vol. 31, Part 4, pp. 3865–3866.[7] But there is nothing whatsoever in the legislative history of the enactment of this provision which warrants the assertion that Congress expressly intended to permit the conversion of a personal action against a Collector of Internal Revenue into an action to enjoin the office, and hence the sovereign, from the collection of taxes, by a continuous process of substituting his successor in office.

Thus the narrow question presented is whether such intention may be imputed to Congress as a result of the enactment of the Act of February 8, 1899, c. 121, 50 Stat. 822, which (with changes not here material) became Section 11 of the Act of February 13, 1925, *supra*. We think the answer to this question must be in the negative.

[7] In addition, there was a discussion on the floor of the Senate on January 9, 1899, reported in the Congressional Record, Vol. 32, Part 1, pp. 492–493.

As has repeatedly been pointed out by this Court (*Caledonian Coal Co.* v. *Baker,* 196 U. S. 432; *Irwin* v. *Wright,* 258 U. S. 219–222; *Ex Parte La Prade, supra; Fix* v. *Phila. Barge Co., supra*), the substitution act was passed by Congress as a result of the suggestion made by the Court in the case of *U. S. ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, 603–604, that such legislation was desirable in view of the inconvenience arising in that and similar cases as a result of the well established rule that actions against public officers abated upon their death.

It is to be noted that the *Bernardin* case was a mandamus proceeding against the Commissioner of Patents to compel him to perform a purely ministerial duty, enjoined upon him by law, and that no pecuniary or property interest of the Government was involved. All of the cases cited by the Court involved proceedings or suits to compel the performance of ministerial duties, in which the United States had no direct interest. Indeed, the Court specifically pointed out that in the actions in question (p. 604):

> * * * the delinquency charged is personal, and involves no charge against the Government, against which a proceeding would not lie.

In its first action upon this suggestion, the idea of Congress appears to have been to include in the substitution, aside from mandamus proceedings,

only suits for injunctions instituted *by* officers of the United States. (See H. Rep. 960, *supra*.) However, suits *against* officers were ultimately included within the scope of the statute. While it does not appear just why Congress broadened the scope of the statute, it may be assumed that it was due to the well recognized fact that suits to prevent officers from acting in excess of their official duties were somewhat correlative to proceedings to compel the performance of ministerial duties. See *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Virginia Coupon Cases*, 114 U. S. 311, 315; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171–172.

But it is apparent that the substitution of the office in mandamus proceedings to compel the performance of a ministerial duty, or in correlative suits for injunction brought against officers where the rights of the sovereign are not brought in question, does not serve to convert them into actions against the sovereign. Such, for example, are the proceedings in mandamus to compel the issuance of a patent (*U. S. ex rel. Bernardin* v. *Butterworth, supra*), or to compel a territorial judge to take jurisdiction of an action attempted to be brought in a territorial court (*Caledonian Coal Co.* v. *Baker, supra*), or suits to enjoin the enforcement of excessive or discriminatory rates (*Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43; *Okla. Gas Co.* v. *Russell*, 261 U. S. 290), or to enjoin an

officer from proclaiming that the complainant corporation was not authorized to do business in the State (*Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146), or to enjoin the institution of a criminal proceeding (*Philadelphia Co.* v. *Stimson*, 223 U. S. 605), or to enjoin the annulment of an official action of a predecessor in office (*Noble* v. *Union River Logging Railroad, supra*), or to enjoin an officer from wrongfully barring the complainant from the use of the mails (*School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94).

In such situations it was obviously desirable that a substitution be permitted in order that the particular office might be given the same status as that of a corporation or a continuing body, such as a commission or board. See *U. S. ex rel. Bernardin* v. *Butterworth, supra,* and *Thompson* v. *United States*, 103 U. S. 480 (cited in the *Bernardin* case), in which the distinction between an officer and a continuing body was pointed out.

But the result of the substitution in the instant case would achieve a different result. Here the interests of the United States are directly involved. Indeed, one of its most essential, if not the most essential, Governmental function, namely, the taxing power, is in question. If continuous substitution is permitted in a suit to enjoin a Collector from collecting the tax or reducing a tax collected by an agent to his possession, then there can be little question that the character of the

suit is changed from one purely personal again
the Collector to one against the sovereign. Th
distinction between the two classes of cases has r
peatedly been pointed out by this Court. An e
position of the subject may be found in *Pennoy*
v. *McConnaughy*, 140 U. S. 1, 10.

III

INTERCOLLEGIATE FOOTBALL GAMES ARE NOT AN ESSEN TIAL GOVERNMENTAL FUNCTION

If any one of the contentions made by the Go
ernment under its first two points is sustained, th
validity of the tax is immaterial in this case. Bu
if this Court should rule against us on both point
it is necessary to consider whether an admissio
tax may be imposed with respect to the sale of foo
ball tickets by an athletic association of a sta
university.

There is no question of statutory constructio
involved. Section 500 (a) (1) of the Revenue A
of 1926, as amended, imposes a tax of 1 cent fo
each 10 cents, or a fraction thereof, of the a
mission price. Section 500 (b) (1) (A) exempt
admissions the proceeds of which inure to th
benefit of educational institutions. Section 5
(e), as added by Section 711 (c) of the Revenu
Act of 1932 provides that this exemption sha
not be allowed in the case of admissions to ath
letic games. Accordingly, the sole question
whether this specific enactment of Congress

invalid because of the implications of the Constitution.

1. We should have thought that there could have been no serious argument that the respondent, or its agents, were engaged in the performance of an essential governmental function in staging intercollegiate football games. It seems clear, as Judge Hutcheson pointed out in his dissent on the last appeal (R. 442), that we are here dealing with "gigantic, commmercialized activities." Hence there is no difference in principle between this case and the case of *Ohio* v. *Helvering,* 292 U. S. 360, 369, where it was held that the State of Ohio was not performing an essential governmental function in conducting retail liquor stores. There, as the Court pointed out, when the State entered the market place seeking customers, it took on the character of a trader. Here it took on the character of a purveyor of entertainment.

The concept of government had changed profoundly from the days of the Roman circuses to the more austere environment in which the Federal Constitution was framed. We hazard the statement that the members of the constitutional convention would doubt that twenty-two men playing a game with a ball constitute an essential governmental function. And we do not conceive that the sovereign functions of the State of Georgia are in any sense dependent on the success of the respondent's football teams. Whatever the popular interest in foot-

ball, it hardly can be supposed that such an activity is one of "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution." *Helvering* v. *Therrell,* No. 128, decided February 28, 1938, p. 4.

2. This would seem to be the case however closely integrated these games were with the educational curriculum of either school. Even if football were a required subject for all able-bodied male students, for which scholastic credit were given, we should not hesitate to say that the staging of intercollegiate football games for profit was not an essential governmental function, and this even though only students partook and received educational credits for making goals or winning games.

Nevertheless, the evidence in this case makes it clear that intercollegiate football games as conducted at these schools are wholly extra curricular, if not purely commercial, activities and that, during the period in question, both the University of Georgia and the Georgia School of Technology, through their respective athletic associations, maintained football teams and staged highly profitable spectacles along lines which have little or nothing to do with the educational functions of respondent.

Thus the evidence discloses the following: At the University of Georgia there were from 135 to 160 students on the football squad (R. 173), and 50

at the Georgia School of Technology[8] (R. 202). At each school there were employed a number of coaches (R. 177–179, 207). Those at the University of Georgia were members of the faculty, both in their capacity as football coaches and as instructors in the Department of Physical Education. In their capacity as coaches, they coached the football teams (R. 177), and in their capacity as instructors in the Physical Educational Department, they taught methods, practice, rules, and theory of coaching sports for high school coaching and for men planning to go into teaching and coaching positions (R. 163–164). But their salaries were paid out of funds of the athletic associations (R. 177). There was only one salary of $1,200 paid from state appropriations in the Department of Physical Education (R. 175).

Participation in football is entirely voluntary on the part of the students (R. 174); it is not a prerequisite to graduation,[9] and no credit is given therefor toward a degree (R. 164, 171, 172, 202, 227). At the University of Georgia, only between 5 to 10 per cent of the members of the football squad were students in the Department of Physical Edu-

[8] Thirty per cent of the students at the University of Georgia engage in intercollegiate athletics of one form or another (R. 162).

[9] This is subject to the somewhat paradoxical qualification that football could be substituted for military training, which is required of all able-bodied students, if the football player were physically unfit for military training (R. 171–173).

cation (R. 174), which had only from 42 to 45 students (R. 163).[10]

The Georgia School of Technology had no such department (R. 203). The schools scout for prospective football material (R. 184, 210–211). No such effort is made to coach or train students specially qualified along educational lines (R. 211–212), and there is no other department which seeks to recruit likely students and persuade or induce them to enter either of the schools (R. 214). About 30 players on the University of Georgia football squad have been given scholarships, derived from its athletic association (R. 182–183), and between 20 and 30 at the Georgia School of Technology (R. 242). The University of Georgia Athletic Association in 1934 donated funds ($8,057.45) to the General Scholarship funds of the University; these funds were given to athletes, who received the entire amount (R. 182–183). About the only restriction upon members of the football team seems to have been that they could not play unless they made certain grades (R. 165).

The athletic association of each school has built a large stadium, that of the University of Georgia having a seating capacity of about 30,000 and that of the School of Technology having a capacity of

[10] This is supported entirely by receipts from athletic contests. No appropriation is made by the State Legislature to go to the Department of Physical Education (R. 175, 218–219, 233).

about 29,000 (R. 187, 205),[11] which is primarily used for athletics (R. 218).[12] Students of the University of Georgia paid an annual athletic fee of $10, and those of the Georgia School of Technology $7.50, which included the right to free admission to all athletic events at their school (R. 176–177, 204). Hence all admissions collected and the tax thereon were paid by the general public, none by the students.[13]

The total receipts of the University of Georgia Athletic Association from all sources for the year ended August 31, 1935, were $91,620.25, of which $71,323.27 was derived from football admissions (R. 268–269), and the total receipts of the Georgia Tech Athletic Association for the six months ended December 31, 1934, from all sources were $119,-436.75, of which $74,168.51 was derived from the sale of tickets (R. 308). The total receipts from

[11] It is to be observed that the enrollment at the University of Georgia was only about 2,400, and at the Georgia School of Technology only about 2,000 (R. 179, 202).

[12] The Stadium at the University of Georgia was built from surplus funds in the hands of the athletic association. The money was borrowed and is being repaid from proceeds of funds of the association (R. 187). The stadium at the Georgia School of Technology cost $275,000 (R. 205). Its building was financed by a gift of $50,000 of Mr. John W. Grant, and returns from the funds received from gate receipts, including fees.

[13] This is borne out by the fact that the only moneys deposited in the special accounts as tax collected were received from the sale of tickets to the public (R. 194–196, 216–217). The Treasury has ruled that student athletic tickets are not taxable. Sales Tax Ruling (S. T.) 563, XI–2 Cumulative Bulletins 522 (1932).

football for the entire year 1934 were in excess of $127,000 (R. 214).[14]

3. At best, the majority of the court below considered the question "most doubtful" whether athletic games and exhibitions for which admission is charged could be considered so much a part of the governmental function of education of a state university as to be free from federal taxation (R. 435). But it resolved that doubt in favor of the function and immunity. In so doing, it is to be noted, the majority resolved its doubt against the validity of the federal statute, which expressly subjected to taxation the admissions to university athletic games or exhibitions without regard to whether it is a state institution.

It requires no more than a statement of the reasons assigned by the majority of the court to demonstrate that they do not justify the somewhat startling conclusion which was reached. These are: (a) that physical education is an integral part of higher education as conducted by the Regents; (b) that the football coaches employed by the athletic associations were members of the faculty; (c) that the contests, as well as the contestants, were subject to regulation by faculty rules; (d) that the money derived from admissions belonged to the state; (e) that athletics are a formal feature of education; (f) that public athletic contests are not

[14] The Georgia Tech Athletic Association derived $50,000 from the Rose Bowl game in California in 1929 (R. 206), and the total receipts from football in that year were about $200,000 (R. 215).

an abuse of physical education; (g) that contests between colleges are a superlative degree of public exhibition, and (h) that the charging of admission dues is similar to a license fee; that it is in effect a tax, and that to prohibit or to tax this is an interference with a legitimate governmental function. On the other hand, the court said that if the Regents had hired athletes the admissions would be taxable.

If the decision in *Ohio* v. *Helvering, supra,* could be avoided by placing state college authorities in charge of a project, an easy way would be open to nullify the decision of this Court. Almost any business could be conducted in the name of education. Thus, an engineering course might be expanded to include the operation of a street railway system and furnish a basis for the claim that the result in *Helvering* v. *Powers,* 293 U. S. 214, had been avoided. The connection of the college authorities with the staging of football games can be justified only because the State regards such contests as an appropriate part of a program of physical education. Without challenging the propriety or the wisdom of such a course, and conceding that the State may decide such questions for itself, we submit that the educational features can extend no further than the student body and that the State with equal propriety could have placed the promotional features of such contests under the direction of others than the college authorities. The fact that the State has selected the college au-

thorities to handle the entire spectacle—including both the educational and the promotional features—does not require that the project in its entirety be considered as educational. The business of furnishing entertainment to the public retains its commercial character and a Federal tax upon the admissions paid by the general public presents no different question than if the promotional features of the project had been entrusted to State officers especially employed for the purpose.

Whatever elements of education may be thought to be involved in intercollegiate football seem to us to be limited to the players. But even if the educational features were acknowledged to extend to the entire student body the general public would still be left to be accounted for. The education or edification of a student body of 2,400 or 2,000 does not require a stadium seating 35,000 or 29,000 persons. The State, in conducting its football games, was plainly not seeking to contribute to the education of non-students and they, equally clearly, were not in attendance for educational purposes. "Education" is a term of broad connotations, but certainly the education which is protected from taxation by the implications of the Constitution relates more to textbooks than to score-cards, and more to intellectual instruction than to responsive shouting for a cheer leader. Thus, we do not see that it can seriously be argued that the general public

which attends a football game is in any way the subject of a State's educational program. And, it is to be noted, the taxable admissions are charged only to the non-student body which attends the games (*supra,* p. 51).

4. Since the tax relates only to the attendance of the public, it seems that it cannot under any view be considered as directed at "auxiliaries primarily designed and used to aid in the management and operation of a governmental function" within the rule announced in *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 406. For, even if it were assumed that intercollegiate football games are a part of the governmental function of education, the attendance of the general public is wholly irrelevant to the supposed educational nature of those games. Even if the exercise obtained by the players and the excitement of the student spectators be thought an integral part of their higher education, these may be received independently of the attendance of the general public.

The only function of the non-student spectator which can be said to relate to higher education is the fact that his admission fee provides the funds to support the athletic programs of the schools. From this it might be argued that the admissions share in defraying expenses of athletic programs of the schools. But any such contention would be baseless under the recent decisions in *Bankline Oil Co.* v. *Helvering,* No. 388, and *Helvering* v.

Mountain Producers Corp., No. 600, decided March 7, 1938.

5. This Court has many times announced the guiding principles which must apply when an immunity from Federal taxation is claimed. The reason for the rule "is found in the necessary protection of the independence of the national and state governments." *Helvering* v. *Powers*, 293 U. S. 214, 225.[15] Since this is the reason for the doctrine of inter-governmental tax immunity, it also marks the limits of the exemption. "Springing from that necessity, it does not extend beyond it." *Board of Trustees* v. *United States*, 289 U. S. 48, 59.

It is difficult to find any activity of government which is farther removed from sovereignty than the conduct of the commercial spectacles which constitute an intercollegiate football schedule. In the case of the Boston Elevated Railway (*Helvering* v. *Powers, supra*) or in the case of the state liquor monopoly (*Ohio* v. *Helvering, supra*) the activities in question not only produced revenue but also served to foster the health, comfort, or

[15] The principle has similarly been formulated in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523; *Willcuts* v. *Bunn*, 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 391; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 328; *Board of Trustees* v. *United States*, 289 U. S. 48, 59.

morals of the community. So far as we are aware, attendance at a football game subserves none of these objectives. The majority of the court below has stretched the principle of tax immunity beyond its outposts.

IV

THE ADMISSIONS TAX DOES NOT PLACE AN UNCONSTITUTIONAL BURDEN UPON THE STATE, EVEN IF IMPOSED WITH RESPECT TO AN ESSENTIAL GOVERNMENTAL FUNCTION.

Wholly apart from the fact that the staging of football games can not be said to be an essential governmental function of the State of Georgia, it seems impossible to say that the imposition of a nondiscriminatory admissions tax upon the private persons who watch these games threatens the sovereignty or independence of the State.

The federal admissions tax is imposed on the person who purchases the admission ticket, and not on the vendor. Section 500 (A) (1) of the Revenue Act of 1926 as amended. It is, therefore, perfectly plain that respondent is completely unaffected by the tax except so far as (1) its receipts from admissions might be thought to be diminished by the imposition of the tax, or (2) it is burdened by the necessity of making tax returns to the Collector. Neither argument can serve to grant the respondent an immunity from a non-discriminatory tax.

1. Any contention that respondent's receipts from its football games would be diminished because of a federal tax imposed and collected on its patrons cannot serve to invalidate the tax. It is highly conjectural to assume that attendance at football games would be diminished by the necessity of paying the admissions tax. The spectator who attends a football game is not a businessman, comparing costs and prices in a commercial transaction, but a person who seeks pleasure on his holiday. Only the most speculative considerations would indicate the possibility of any appreciable diminution in attendance if a tax were imposed in addition to the ordinary charge for admission.

But even if the federal tax were certain to result in diminished revenues to the athletic associations, this would afford no basis for declaring their patrons immune. This Court has twice, in the present Term, expressly held that the lowered revenues or increased costs to the sovereign which may result from a non-discriminatory tax on private persons afford no basis for extending to them the sovereign's immunity from taxation. *Helvering* v. *Mountain Producers Corps.*, No. 600, this Term; *James* v. *Dravo Contracting Co., supra*, p. 160. And, in a variety of situations, the earlier decisions of this Court have sanctioned taxes which, much more necessarily than is the case here, had the effect of reducing the revenues or increasing the costs of the sovereign. *Wheeler Lumber Co.* v.

United States, supra; Alward v. *Johnson, supra; Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *Tirrell* v. *Johnston,* 293 U. S. 533; *Liggett & Myers Co.* v. *United States, supra.*

2. The only other ground on which the State can be argued to be affected by a tax on those buying football tickets is the fact that the athletic associations are required to make returns of and pay over to the Collector the amounts of the federal tax which they receive from their patrons. Section 502 (a), *infra,* requires the person receiving payments for admissions to make monthly returns under oath and pay the taxes collected by him to the Collector of Internal Revenue. The general provisions of the Act of 1926 require, in Section 1102 (a), *infra,* that persons liable for the collection of the tax shall keep records and comply with the regulations of the Commissioner, and further subject, in Section 1114 (d), *infra,* the person collecting the tax to a penalty for the amount of the tax in the case of a willful failure to collect or to pay over the tax to the collector.

This case presents no occasion for considering whether or not the requirement that the athletic associations collect and account for the federal tax infringes any sovereign immunity of the State.[16] If

[16] It may be observed, however, that the practical burden of making returns and paying over the taxes collected seems plainly to be so trifling as to afford no basis for any contention that the independence of the State's sovereignty is threatened. And a claim of tax immunity "cannot be sup-

the respondent has collected the tax, we do not see any basis upon which it could be permitted to retain the money. If the respondent has taken from the purchasers of tickets sums of money, which would not have been taken except for the tax statute, it would be wholly inequitable for a court of equity to permit respondent to retain the money upon the ground that respondent could not have been required to collect it in the first instance. Such a result would be unjustly to enrich the respondent.

Accordingly, we think that, in this proceeding at least, it is entirely inappropriate to deal with the question whether respondent could be required by the Federal Government to collect the tax. If it be decided that the Federal Government may validly impose the tax and may validly request the States to cooperate with the Federal Government and aid in the collection, we do not think that any State can make the collection and then keep the money upon the ground that it could not have been re-

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ported by merely theoretical conceptions of interference with the functions of government. Regard must be had to the substance and direct effects." *Helvering* v. *Mountain Producers Corp.*, decided March 7, 1928. Moreover, a state, as fully as a private litigant, must show an immediate and a tangible injury in order to attack as invalid an Act of Congress. *Massachusetts* v. *Mellon*, 262 U. S. 447; *New Jersey* v. *Sargent*, 269 U. S. 328; cf. *Alabama* v. *Arizona*, 291 U. S. 286; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70. The burdens of the tax collection cannot, we submit, reasonably be thought to be of sufficient weight to afford any ground for attack upon the federal statute.

quired to act as a collecting agent. That question may properly be reserved until such time, if ever, as the Federal Government seeks to impose a penalty upon State officers for failure to collect the Federal tax.

It results that, even if respondent were thought to be engaged in a governmental function in staging the football games, it has no standing to assert a constitutional immunity from this federal tax which is imposed upon its patrons alone. The tax has no effect on the State which entitles respondent to the relief which it seeks.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the lower court should be reversed, with directions to the District Court of the United States for the Northern District of Georgia to dismiss the bill of complaint.

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APRIL 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 500 (b) No tax shall be levied unde this title in respect of—

(1) Any admissions all the proceeds o which inure (A) exclusively to the benefit o religious, educational, or charitable institu tions, societies, or organizations, societies fo the prevention of cruelty to children or an mals, or societies or organizations conducte for the sole purpose of maintaining sym phony orchestras and receiving substanti support from voluntary contributions, or o improving any city, town, village, or othe municipality, or of maintaining a cooper tive or community center moving-pictu theater—if no part of the net earning thereof inures to the benefit of any priva stockholder or individual; * * *.

* * * * *

(d) The price (exclusive of the tax to b paid by the person paying for admission) a which every admission ticket or card is sol shall be conspicuously and indelibly printe stamped, or written on the face or back o that part of the ticket which is to be take up by the management of the theater, oper or other place of amusement, together wit the name of the vendor if sold other than a the ticket office of the theater, opera, or othe place of amusement. Whoever sells an ad mission ticket or card on which the nam of the vendor and price is not so printe

stamped, or written, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $100. (U. S. C., Title 26, Secs. 941–944.)

SEC. 502 (a) Every person receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 500 or 501 from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 501. Such persons shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

* * * * *

(c) The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

(d) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. (U. S. C., Title 26, Secs. 955–957.)

SEC. 1102. (a) Every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of

the Secretary, may from time to time prescribe. (U. S. C., Title 26, Sec. 960.)

* * * * *

SEC. 1114. * * *

(b) Any person required under this Act to collect, account for, and pay over any tax imposed by this Act, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(d) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by Titles IV, V, VI, VII, VIII, and IX, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of section 3176 of the Revised Statutes, as amended, or for any offense for which a penalty has been recovered under section 3256 of the Revised Statutes.

(e) Any person in possession of property or rights to property, subject to distraint, upon which a levy has been made, shall, upon

demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(f) The term "person" as used in this section, includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(U. S. C., Title 26, Secs. 494, 856, 921, 958, 1047, 1127, 1155, 1610, 1693.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 711. ADMISSIONS TAX.

(a) Paragraph (1) of Section 500 (a) of the Revenue Act of 1926, as amended is amended to read as follows:

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is less than 41 cents, no tax shall be imposed. In the case of persons (except bona fide employees, municipal officers on official business, and children under 12 years of

age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, an equivalent tax shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscribed for a single admission is less than 41 cents;"

* * * * * *

(c) Section 500 of the Revenue Act of 1926, as amended, is amended by adding at the end thereof the following subdivision:

"(e) The exemption from tax provided by subdivision (b) (1) (A) shall not be allowed in the case of admissions to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions. The exemption from tax provided by subdivision (b) (1) shall not be allowed in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States)."

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(U. S. C., Title 26, Secs. 940, 941.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 607. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of the tax so collected or withheld shall be held to be a special fund in trust for the United States.

The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. (U. S. C., Title 26, Sec. 1551.)

Revised Statutes:

SEC. 3187 (as amended by Sec. 1016 of the Revenue Act of 1924, c. 234, 43 Stat. 343). If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. (U. S. C., Title 26, Secs. 1580.)

SEC. 3220 (as amended by Section 1111 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and by Section 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791). Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully coected; aso to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-

revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section. (U. S. C., Title 26, Sec. 1670.)

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, Sec. 1543.)

SEC. 3226 (as amended by Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and by Section 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169). No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of

mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228 (as amended by Section 1112 of the Revenue Act of 1926, c. 27, 44 Stat. 9, by Section 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and by Section 1106 of the Revenue Act of 1932, c. 209, 47 Stat. 169). (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation

then in existence, shall not be allowed. (U. S. C., Title 26, Sec. 1433.)

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and power of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. (U. S. C., Title 31, Sec. 203.)

Judicial Code:

SEC. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (U. S. C., Title 28, Sec. 384.)

Act of February 13, 1925, c. 229, 43 Stat. 936, 941:

SEC. II. ACTION IF FEDERAL, ETC., OFFICER DIES WHILE SUIT PENDING

(a) That where during the pendency of an action, suit, or other proceeding brought by

or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (U. S. C., Title 28, Sec. 780.)

Treasury Regulations 43, promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928 and 1932:

ART. 5. *Regular or established price defined.*—By the "regular or established

price" of admission is meant the full-rate price fixed by the person controlling such price at the beginning of the first sale or distribution of tickets or cards valid on that occasion as the price to be charged for that particular class of admissions. The person in control has, of course, the power to fix the price actually to be charged for admission. He has, therefore, the power to determine the established or regular price. But as an established price is a matter of substance, not of name, the mere fact that he calls a price an established price does not make it such. The established or regular price of admission may be uniform as to all classes of admissions or may vary in accordance with the accommodations to which admission is granted, increasing from the price of a mere general admission through the various grades of accommodations to the best accommodations. Any scale of prices, adopted in good faith, in which the prices increase regularly with the increase of accommodation, will be considered to show the true established or regular prices of admission to such respective accommodations; but the variation of prices must be regular and based on a real difference of accommodation and not merely arbitrary. The established price of an admission need not be the same for different attractions or even for different performances of the same attraction; but when tickets have once been put on sale for a particular performance or attraction the price of admission for every accommodation at that performance or attraction has been established. Established prices of admission once so adopted are not affected by the mere sale of a few admissions at prices different from the ones so established. Established prices once adopted for any occa-

sion may not be thereafter increased for that occasion. If tickets are subsequently sold at a higher price, the excess charge will be taxable. Prices once established or adopted may be reduced, but in such case liability to excess-charge taxes with respect to all admissions sold at the original established prices can be avoided only by complying with the following conditions:

(1) Any reduction of established price must include all admissions of that particular established price and must grant an equal reduction in the case of each; (2) such reduction must not result in setting a lower price on admission to certain accommodations than is charged on that occasion under similar circumstances for admission to accommodations which are in all substantial respects similar; (3) public notice must be promptly given of the reduction and of the fact that every person having paid for admission at the former established price can secure a refund at any reasonable time of the amount he paid in excess of the new established price; and (4) such refunds must be actually made promptly on request.

The foregoing provisions of this article relate to single admissions, but they also control in the case of season tickets and subscriptions. The established price for a season ticket or subscription is the amount fixed (at the beginning of the sale of such ticket or subscription by the person controlling the price) as the price to be charged therefor.

The price (exclusive of the tax imposed under section 500 (a) (1)) at which every ticket or card of admission is sold must be conspicuously and indelibly printed, stamped, or written on the portion thereof

which is to be taken up by the management of the theater, opera, or other place of amusement for which it is valid. And if sold at a place other than the ticket office of the theater, opera, or other place of amusement the name of the vendor must also be shown.

ART. 29. *Requirements applicable to tickets.*—Where tickets or cards of admission are used, they must comply with the following requirements:

(1) The price (exclusive of the tax to be paid by the person paying for admission) at which every ticket or card is *sold* must be conspicuously and indelibly printed, stamped, or written on that part of the ticket which is to be taken up by the management of the place for which it is valid for admission. This is a specific requirement of the Act itself. For administrative purposes it is necessary to show not only the selling price but also (a) the regular or established price (see Art. 5), (b) the tax, and (c) the total of the price and tax. The regular or established price, the tax based thereon, and total shall appear on the *face* (in the case of strip tickets the back may be used) of the portion of the ticket which is to be taken up by the management in the following or equivalent form:

Established price---------- ------
Tax paid---------- ------
Total ---------- ------

If the ticket is sold at a price other than the regular or established price, the actual selling price, the tax based thereon, and the total shall be shown on the *back* of the portion of the ticket to be taken up by the management; and if the ticket is sold other than at the ticket office of the theater, opera, or other

place of amusement, the name and address of the vendor must also be shown on the *back* of the same portion of the ticket. For penalties imposed in this connection see article 56.

The foregoing applies primarily to *taxable* admissions. As no tax is imposed on admissions of less than 41 cents, it is only necessary that the price of such tickets (and the name of the vendor when required by the Act) be shown. This must be shown, since the requirements of the Act in this matter apply to "every admission ticket or card" without regard to the price for which it is sold. Where admissions are exempt on other grounds, the tickets should show that fact. This may be done in the following or equivalent form:

Established price ---------- ----
Tax free.

(2) The name of the place to which a ticket or card is valid for a taxable admission must in all cases be shown thereon. Moreover, tickets must either show the date for which they are valid or must be serially numbered. If serially numbered tickets are used, there must be a separate and distinct series for each established price. The numbers of each series must start with 1 and run continuously in regular order until 500,000 is reached, after which they may again start at 1 if so desired. In such case, however, a letter of the alphabet must precede or follow the serial number to distinguish the new series from the preceding series, and such letters must be used in turn until the alphabet is exhausted before starting again with the letter A. No place to which taxable admissions are sold shall have, or permit to be, at such place at the

same time two or more rolls or series of tickets of the same established price bearing identical serial numbers which are not distinguished by different letters of the alphabet. Serially numbered tickets must be issued consecutively in the order of the serial numbers, and the letters of the alphabet, if any, of that particular series.

Exceptions.—(a) Since tickets or cards of admission which are sold for less than 41 cents are not taxable, they need not be serially numbered or dated, nor need they have the name of the place to which they are valid printed thereon. They must, however, show the price.

(3) In the case of bona fide season or subscription tickets, a strip of tickets or a single ticket or card may be used to evidence more than one admission. In every other case, where several single admissions are sold or disposed of at one time, there must be separate or separable coupons to evidence each right to admission. Thus, in the case of combination tickets, issued by outdoor amusement parks, which entitle the holder to admission to a number of different attractions, there must be a separate ticket or coupon for each such attraction. Furthermore, each separate ticket or coupon must either be dated, or be serially numbered in accordance with requirements (1) and (2). If serial numbers are used on such combination tickets, each coupon thereof should bear the same serial number as the stub or cover of the ticket itself.

(4) No person shall be admitted, unless admitted free, to any place admission to which is taxable, and which uses tickets or cards, except upon the presentation of a card or ticket complying with the preceding

requirements. The ticket or card so presented or a portion thereof must be taken up, at the time of admission, by the management of the place, except in the case of a bona fide subscription or season ticket covering two or more admissions. Under ordinary circumstances the tickets or cards or portions thereof so taken up need not be preserved by the management of the place, but from time to time, on short notice from a collector of internal revenue or a revenue agent, the management must carefully preserve, until inspection by such officer, all tickets or cards or portions thereof taken upon the occasions designated in such notice.

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ART. 54. *Abatement or refund of erroneous or illegal assessments or collections.*— A claim for the abatement or for the refund of any taxes alleged to have been erroneously or illegally assessed or paid (or of any penalties assessed or collected without authority) must be filed by the person or organization against whom the taxes were assessed, or by whom such taxes were in the first instance erroneously or illegally paid. The claim should be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See sec. 3228, R. S., as amended.)

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